INDEX

Table of Cases

STATUTES

CONSTITUTIONS

COURT RULES

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 493.

EDWARD L. SCHEUFLER, SUPERINTENDENT OF THE INSURANCE DEPARTMENT OF THE STATE OF MISSOURI, PETITIONER,

VS.

CENTRAL SURETY AND INSURANCE CORPORATION, A CORPORATION, AND R. E. O'MALLEY, RESPONDENTS.

BRIEF FOR RESPONDENT, CENTRAL SURETY AND INSURANCE CORPORATION, IN OPPOSITION TO PETITION FOR CERTIORARI.

Petitioner seeks a Writ of Certiorari to review a judgment of the Supreme Court of Missouri which reversed outright a judgment of the Circuit Court of Jackson County, Missouri, at Kansas City.

There has been no official report of the opinions delivered by the Supreme Court of Missouri but they are reported unofficially in 163 S. W. 2d 750 (on the merits) and 163 S. W. 2d 749 (*per curiam* opinion of Supreme Court of Missouri *en banc* denying petitioner's application for leave to file *en banc* a motion to transfer the cause from

Division Number 2 of the Supreme Court of Missouri to that court *en banc*). No opinions were written by Division Number 2 of the Supreme Court of Missouri (the court that decided the case at bar) on either its denial of petitioner's motion for rehearing or its denial of petitioner's motion to transfer to the Supreme Court of Missouri *en banc*, both of which were, under the Missouri practice and procedure, properly filed in said Division Number 2.

The following sections of the brief are in the order indicated in Rule 27 of this Court.

JURISDICTIONAL STATEMENT.

Rule 7, paragraph 3, of this Court provides that "no motion by respondent to dismiss a petition for certiorari will be received" but that "objections to the jurisdiction of the Court to grant writs of certiorari may be included in the briefs in opposition to petitions therefor." In compliance with that rule we respectfully show the Court that plaintiff's complete failure to comply with the rules of this Court require the denial of the petition for writ of certiorari.

The Petition for Writ of Certiorari Contains No Jurisdictional Statement As Required by the Rules of This Court.

Rule 38, paragraph 2, of this Court provides that "the petition shall contain * * * a statement particularly disclosing the basis upon which it is contended that this Court has jurisdiction to review the judgment or decree in question (See Rule 12, paragraph 1)." Rule 12, paragraph 1, of this Court specifically provides that "the provisions of this paragraph, with appropriate record page references, must be complied with when review of a state court judgment is sought by petition for writ of certiorari (See Rule 38, paragraph 2)."

The petition for writ of certiorari in the case at bar contains no jurisdictional statement whatsoever. Therefore, the provisions of Rule 38, paragraph 2, providing that "a failure to comply with these requirements will be a sufficient reason for denying the petition" is directly applicable and the petition should be denied.

The Bar and the public have long been apprised of the decisions of this Court that failure to comply with its rules is fatal. In addition to the cases cited in Rule 38, paragraph 2, see *Humble Oil & Refining Company* v. *Campbell*, 292 U. S. 648, and *Brown* v. *Krietmeyer*, 275 U. S. 496, where petitions for writs of certiorari were denied for failure to make only a summary and concise statement of the matters involved and the reasons relied upon for issuance of the writ. The cases denying jurisdiction for failure to comply with Rule 12 are so numerous as to require no citation. See also *Davis* v. *Currie*, 266 U. S. 182, and *Southern Power Company* v. *North Carolina Public Service Co.*, 263 U. S. 508, for denials of petitions for writs of certiorari on account of other failures to comply with Rule 38.

Petitioner is not aided by that section of his supporting brief entitled "Jurisdiction" found on page 2 thereof, for two reasons: First, because the supporting brief is not a part of the petition for writ of certiorari, and second, because even if so considered, petitioner's statement in the supporting brief does not comply with the requirements of the rules of this Court.

Supporting Brief Not a Part of Petition for Writ of Certiorari.

General Talking Pictures Corporation v. *Western Electric Co.*, 304 U. S. 175, 178, held that:

> "Whether (the questions presented are) included in the petition or separately presented, *the supporting brief is not a part of the petition* * * *" (parentheses and emphasis ours).

The above case passed upon the matter of whether questions not presented in the petition for writ of certiorari were before this Court and held that only those questions specifically set out in the petition were to be so considered. However, the principle that "the supporting brief is not a part of the petition" upon which the decision of that case was based is even more applicable to the case at bar, because both Rule 38 and Rule 12 specifically require the petitioner to make a jurisdictional statement in the petition for writ of certiorari. Failure to do so under the rules and decisions of this Court is a sufficient reason for denying the petition.

Petitioner's Statement Concerning Jurisdiction Contained in Supporting Brief Does Not Comply with Rules.

Even if Petitioner's statement entitled "Jurisdiction" be considered a part of the petition, which this respondent denies, there still is a total failure on the part of petitioner to meet the burden of affirmatively showing this Court that it has jurisdiction. There is no question that such is petitioner's burden in the light of *Gorman* v. *Washington University*, No. 711, decided by this Court April 27, 1942, in which it was held that "upon application to this Court for review of the judgment of a state court, it is the petitioner's burden to show affirmatively that we have jurisdiction." The record shows that petitioner is thoroughly familiar with that case. In fact, petitioner relied upon that case in attempting to file a motion for transfer in the Supeme Court of Missouri *en banc*, instead of filing it only in Division Number 2 of the Supreme Court of Missouri, the Division in which the case was decided, as has been the settled practice in Missouri since 1896 (see *per curiam* opinion of the Supreme Court of Missouri *en banc*, denying petitioner's application for leave to file *en banc* his motion to transfer, Tr. 1470, and see also foot note contained in said motion, Tr. 1406).

Rule 12, paragraph 1, which is incorporated into Rule 38, by paragraph 2 thereof, explicitly provides regarding the jurisdictional statement in petition for writ of certiorari that:

> "The statement shall show that the nature of the case and the rulings of the court were such as to bring the case within the jurisdictional provisions relied on and shall cite the cases believed to sustain jurisdiction. It shall also include a statement of the grounds upon which it is contended that the questions involved are substantial (*McArthur* v. *United States*, 315 U. S. 717; *Zucht* v. *King*, 260 U. S. 174, 176, 177)."

None of the requirements of this portion of Rule 12 are met by petitioner. Even petitioner's supporting brief does not show the nature of the case; neither is a single case cited to sustain this Court's jurisdiction, nor is there any where stated or suggested a substantial federal question.

Rule 12 also provides:

> "If the (certiorari) is from a state court, the statements shall in addition specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them * * *; and the way in which they were passed upon by the court; with such pertinent quotations of * * * the record * * * as will support the assertion that the rulings of the court were of a nature to bring the case within the statutory provision believed to confer jurisdiction on this court" (Parentheses ours).

Nothing in the petition for writ of certiorari can be construed as a compliance with the above portion of Rule 12. Even if petitioner's supporting brief be considered a part of the petition, which this respondent denies, still there is no compliance. Petitioner admits on page 5 of his petition that the first time he attempted to inject

any question that could be later raised in this Court, was by motion for rehearing in the Supreme Court of Missouri after that court had determined the case and had filed its written opinion found on page 1339 of the transcript (Petitioner does not mention the fact that, under the Missouri practice, this attempt was too late to have those questions considered, or the fact that he does not now attempt to present the questions here that he attempted to raise below but tries to raise an entirely new and different question for the first time in this Court, as will be subsequently shown hereinafter).

The only place where it could be said that petitioner even mentioned the matters required to be stated in the jurisdictional statement is on page 12 of the argument contained in the supporting brief. Even if this portion of the argument could be considered a part of the section of petitioner's briet entitled "Jurisdiction" and, even if thus transposed, that portion of the argument together with said "jurisdiction" section could in like manner be retransposed so as to be considered as a part of the petition, all of which this respondent denies is possible, there still is no compliance with the rules because the cases cited by petitioner are not applicable to the case at bar.

Petitioner on page 12 of his argument in the supporting brief contends that he has a valid excuse for not attempting to raise the matters now complained of prior to the motion for rehearing because:

> "* * * It cannot be said, as it was said in *Herndon* v. *Georgia,* 295 U. S. 441, that respondent* should have anticipated the unconstitutional construction of

*The word "respondent" should undoubtedly be read as "petitioner." The error is probably one of oversight in having this verbatim argument copied from petitioner's suggestions in support of motion to transfer that he filed in the Supreme Court of Missouri (Tr. 1418). In fact, except in important particulars to be hereinafter mentioned, petitioner's entire argument up to the point quoted and a good portion of it thereafter is but a verbatim copy of the suggestions in support of motion to transfer filed in the Supreme Court of Missouri (Compare Tr. 1416 to 1420 with pages 8 to 12 of petitioner's supporting brief).

the statutes. Consequently presentation in detail of the federal questions on motion for rehearing is sufficient presentation in point of time."

Petitioner overlooks completely that it has long been the rule of this Court that if a federal question is not raised in accordance with the state practice, then, absent evasion on the part of the state court, this Court will not exercise jurisdiction to hear the cause.

The Questions Petitioner Seeks to Raise Here Were Not Properly Raised under Missouri Practice.

The unquestioned rule of decision of this Court is adequately stated in *Herndon* v. *Georgia,* 295 U. S. 441, 443. It is there stated:

> "The federal question was never properly presented to the state supreme court unless upon motion for rehearing; and that court then refused to consider it. The long-established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it (Citing many cases) * * *"

Decisions of this Court dealing particularly with the Missouri practice and applying the foregoing rule of decision are numerous. We first call attention to *Layton* v. *Missouri,* 187 U. S. 356, wherein it is stated:

> "After judgment (in Division Number 2 of the Supreme Court of Missouri) was entered affirming the judgment of the trial court, defendant moved that the cause be transferred to the court *en banc,* and the motion was denied.
>
> "By the Constitution of Missouri, the supreme court was divided into two divisions; division Number 1, consisting of four judges, and division Number 2, consisting of three judges, the latter having exclusive cognizance of all criminal causes; and it was provided that cases, in certain circumstances, among others when a Federal question was involved, on the application of the losing party, should be transferred to a full bench for decision. * * *"

In denying jurisdiction, this Court held:

> "* * * It has been repeatedly laid down by the supreme court of Missouri, in disposing of questions of jurisdiction as between itself and intermediate courts of appeal, that 'the appellate jurisdiction of the supreme court contemplates a review only of the matters submitted to and examined and determined by the trial court. Hence it is well settled that this court has no jurisdiction of an appeal, on the ground that a constitutional question is involved, unless the question was raised in and submitted to the trial court.' *Browning* v. *Powers*, 142 Mo. 322, 44 S. W. 224; *Bennett* v. *Missouri P. R. Co.*, 105 Mo. 645, 16 S. W. 947; *Shewalter* v. *Missouri P. R. Co.*, 152 Mo. 551, 54 S. W. 224.
>
> "* * * we cannot interfere with the action of the highest court of a state in adhering to the usual course of its judgments, and we have frequently ruled that this court cannot review the final judgments of the state courts on the ground that the validity of state enactments under the Constitution of the United States had been adjudged, where those courts 'did nothing more than decline to pass upon the Federal question because not raised in the trial court, as required by the state practice.' *Erie R. Co.* v. *Purdy*, 185 U. S. 148, 154, 46 L. Ed. 847, 850, 22 Sup. Ct. Rep. 605, 607.
>
> "This case falls within that rule * * *."

Hartford Life Insurance Company v. *Johnson*, 249 U. S. 490, 493, also passing upon the Missouri practice, held:

> "No suggestion is or could be made, that the Missouri state supreme court's holding in this case was framed to evade the consideration of the Federal right now asserted, for it had long been the established law of that state that, under its system of practice, the construction of either the Federal or state Constitution would not be treated as involved in a case, in a jurisdictional sense, unless it appeared that such question was raised and ruled on in the trial court, and also that constitutional questions could not be injected into a case for the first time in an appellate

court by argument or brief of counsel for the purpose of giving jurisdiction. *Miller* v. *Connor*, 250 Mo. 677, 684, 157 S. W. 81. * * *

"On the authorities thus cited we are obliged to conclude that the question * * * was not so presented to or ruled upon by the supreme court of Missouri as to present a Federal question for review by this court."

No attempt is made by petitioner and any attempt would, of necessity, fail, because of the record in the case at bar, to charge that the Supreme Court of Missouri attempted to evade passing upon any federal question. The action of Division Number 2 of the Supreme Court of Missouri in refusing to transfer the case at bar to the Supreme Court of Missouri *en banc* conclusively decided that no federal question was properly before the Supreme Court of Missouri because of petitioner's failure to raise the same in accordance with the established Missouri practice.

On this point *Layton* v. *Missouri*, *supra*, is controlling:

"It thus appears that the supreme court * * * by denying the motion to transfer the cause, was of opinion that the validity of the statute was not so drawn in question for repugnancy to the Constitution of the United States as to require decision as to its validity in that view."

Under the rule of *Gorman* v. *Washington University*, *supra*, likewise passing upon the Missouri practice, it is the petitioner's burden to show affirmatively that this Court has jurisdiction. In this instance petitioner has failed either to assert or in any way imply that the Supreme Court of Missouri attempted to evade the decision of any federal question. On the contrary, the refusal of Division Number 2 of the Supreme Court of Missouri to transfer the case at bar to the Supreme Court of Missouri *en banc* showed that it did not consider that any federal question was before that court because under the Mis-

souri practice such a question must be raised in the trial court in order to be within the appellate purview of the Supreme Court of Missouri.

It is without question that the Supreme Court of Missouri followed the settled Missouri practice in the case at bar.

Wilson & Company, Inc., v. *Hartford Fire Insurance Co.*, 300 Mo. 1, 254 S. W. 266, 285, illustrates the Missouri practice of refusing to transfer to the Supreme Court *en banc* where a federal question was not raised in the trial court and properly preserved for consideration on appeal. In that case the losing party contended, as petitioner now contends in the case at bar, that there was involved a federal question. In refusing to transfer the Supreme Court of Missouri held:

> "A federal question as here urged involves a construction of the Constitution. We have repeatedly held that the construction of either the federal or the state Constitution would not be treated as involved in a case in a jurisdictional sense, unless such question had been raised and ruled upon in the trial court. Not only was this not done, but its first appearance is in the filing of this motion. *Miller* v. *Connor*, 250 Mo. 677, 157 S. W. 81. This cannot be construed as other than an afterthought on the part of the appellant. The cases cited by appellant in support of the motion all show that the federal question there claimed to have been involved was raised specifically in the trial court, and was properly preserved for consideration upon appeal. The Supreme Court of the United States, in passing upon this question, has given affirmative approval to our own rulings in this regard, and has held that no right, privilege, or immunity claimed under the Constitution can be considered as involved in a case, unless it is specifically asserted and preserved for consideration, and that the decision of the court complained of must be against the right asserted to entitle the question to consideration upon appeal, either in the state Supreme Court or in the Supreme Court of the United States. *Say-*

ward v. *Denny*, 158 U. S. 180, 15 S. Ct. 777, 39 L. Ed. 941."

Holstein v. *Roofing Co.*, 325 Mo. 899, 42 S. W. 2d 573, states the procedural rule of Missouri requiring constitutional questions to be raised at the earliest possible moment. The Supreme Court of Missouri there held that:

> "The rule is uniform that a constitutional question must be raised at the first opportunity and kept alive in the course of orderly procedure. In the nature of things there can be no fixed rule as to when or how or at what stage of the proceedings the question should be raised in each case. But the rule is well established that it is too late to raise a constitutional question in the motion for a new trial."

In this case petitioner was under duty to raise any constitutional question in his exceptions to O'Malley's report. This he failed to do. No federal question of constitutionality of the Missouri Insurance Code was properly raised because there admittedly was no attempt to raise such a question until a petition for rehearing was filed in the Supreme Court of Missouri.

In *Mike Berniger Moving Co.* v. *O'Brien*, 234 S. W. 807, a plaintiff attempted to enjoin the chief of police of St. Louis from enforcing an ordinance which plaintiff alleged was invalid. In holding that no constitutional question was involved, the Supreme Court of Missouri held:

> "If the plaintiff desired to challenge the constitutionality of said ordinance, set out in petition, and offered in evidence, it should have done so in its petition, as this was the earliest opportunity for raising said question. Having tried the case on its merits without presenting or raising any constitutional question, it could not be raised so as to confer jurisdiction of the cause on this court by presenting said question for the first time in the motion for a new trial."

State ex rel. Tadlock v. *Mooneyham*, 296 Mo. 421, 247 S. W. 163, involved an action against a County Treasurer

to restrain him from paying a warrant issued by the County Court of Jasper County, Missouri. Judgment was for the plaintiff and defendant appealed. In holding that it had no jurisdiction, the Supreme Court of Missouri held:

> "The petition by which the injunction and the cancellation of the warrant are sought does not mention the Constitution. It only says the county court had no legal authority to make the contract or issue the warrant. The answer alleged that it had. The Constitution is not mentioned in the answer.
>
> "In order that a constitutional question may be raised, so as to give this court jurisdiction, it must be presented to the trial court at the earliest possible moment and kept alive throughout the case. * * * There is nothing to show that the trial court passed upon or considered a constitutional question. It should have been raised in the pleadings, because every fact affecting the case is set forth in the pleadings, and if these facts show that any section of the Constitution was involved in determining the issues presented, such section of the Constitution should have been cited."

Petitioner in the trial court originally filed sixteen separate exceptions to O'Malley's Final Report and Accounting (Tr. 59-67). Not one of these exceptions even remotedly hypothesized petitioner's present theory, nor was any reference made to any provision of either the State or Federal Constitutions. Fourteen new exceptions were made by petitioner to O'Malley's Supplemental Report and Accounting (Tr. 90-97). These exceptions likewise preserved petitioner's silence regarding any constitutional question. Thereafter and subsequent to the time that all the evidence in the case had been heard, petitioner stipulated as to what exceptions he would rely upon. By this stipulation (Tr. 99) petitioner expressly limited his exceptions to seven specific items and in none was there any injection of any constitutional question. In the trial court petitioner filed a thirty-eight page printed brief together with a fifteen page reply brief, neither of which

contained a single word concerning petitioner's present theories nor the slightest reference to any constitutional question.

Petitioner in the trial court—indeed, in the Supreme Court of Missouri—not only did not question the constitutionality or validity of the statute herein involved (The Insurance Code) but expressly relied upon it as the basis for the judgment which he obtained in the trial court. Throughout the litigation, until the Supreme Court of Missouri decided against him, he undertook to use the statute (and an unreasonable construction of it) as a weapon for imposing upon the Superintendent and his Surety an unconscionable judgment.

As a matter of fact, the proceeding from the beginning was guided and governed by this very statute—the Insurance Code. The original proceeding is still pending in the Circuit Court of Jackson County, Missouri. The petitioner herein is now the Superintendent, acting in the proceeding under the various statutes which he now assails. If he is paying, or hereafter expects to pay any expense of the administration in the proceeding, he must pay that out of the identical fund from which the expense in question was paid. There is no other fund out of which such expense can be paid. Reference will hereafter be made to this fact.

We respectfully submit that the petition should be denied because:

(1) It fails to comply with the rules of this Court in the respects hereinbefore noted.

(2) It fails to state any facts upon which the jurisdiction of this Court might or could be based.

(3) It fails to indicate that any Federal or Constitutional question is involved.

(4) It fails to indicate any reason why this Court should exercise its discretionary power in granting the

writ, even if facts were stated upon which such discretion might be predicated.

(5) It shows that petitioner not only failed to raise any Federal or Constitutional question in the trial court or before the Supreme Court of Missouri, but further shows no such question was actually involved so that it could have been raised.

(6) It demonstrates that petitioner now undertakes to assail the statute in question upon allegedly constitutional grounds after long reliance and action upon its validity, and after urging a construction of it, which the Supreme Court of Missouri has completely repudiated—a construction, which was wholly unreasonable and the repudiation of which within all reason should have been anticipated at the outset.

STATEMENT OF CASE.

Rule 27, paragraph 4, provides that respondent need not make any statement of the case beyond what may be necessary to correct any inaccuracies or omissions in the statement made by petitioner. Petitioner's statement is so incomplete and inaccurate that this respondent believes the Court would be aided by a concise statement of the case. Thereafter, the inaccuracies in petitioner's statement will be noted.

Under the Missouri practice, the case at bar was considered *de novo* by the Supreme Court of Missouri (See *Robertson, Superintendent of Insurance,* v. *Manufacturing Lumbermen's Underwriters et al.*, 346 Mo. 1103, 145 S. W. 2d 134, involving another appeal arising out of the same litigation as the appeals in this case and in which the trial court was also reversed). This rule of practice requires the Supreme Court of Missouri to make its own findings of fact independent of any findings of the trial court. It, of course, did so. Because the rule of this Court is that "the decision of the state court upon a question of fact cannot be made the subject of inquiry here" (*Grayson* v. *Harris*, 267 U. S. 352, 358), we shall make the statement by using direct quotations from the opinion of the Supreme Court of Missouri (Tr. 1339-1358), including matters pertinent to an understanding of the facts.

Facts.

"On November 12, 1936, appellant, O'Malley, as Superintendent of Insurance, took charge of the affairs of Manufacturing Lumbermen's Underwriters, a reciprocal insurance exchange. This concern will be referred to as M. L. U. On October 20, 1937, O'Malley was succeeded in office by George A. S. Robertson. Robertson filed ex-

ceptions to the report of O'Malley with reference to the expenses incurred in handling the affairs of M. L. U. The trial court surcharged O'Malley with $85,264.44 and entered a judgment against O'Malley and his surety, the Central Surety and Insurance Corporation. From that judgment two separate appeals were taken (Tr. 1339-1340).

* * * * * * * *

"* * * When O'Malley took charge of M. L. U. an examination of its affairs was being made by the Superintendents of Insurance of Missouri, Iowa, Illinois and Oklahoma. O'Malley's petition was assigned to Judge Daniel E. Bird. The court made an order, as contemplated by section 6057, authorizing O'Malley to take temporary charge of the property of M. L. U. and to receive its premiums and income. M. L. U. and its attorney in fact were restrained from further transaction of business. Harold C. Fielder was appointed by the superintendent as agent to take charge of the affairs of the company and placed under a $50,000 bond. On November 16, the attorney in fact filed an application for a change of venue, or rather an application to disqualify the trial judge. The court never ruled on this application. November 18, by agreement of the parties, the case was continued for a final hearing until a report could be had of the examination by the departments of insurance of the four states above mentioned. That examination was completed December 21, 1936. However, prior thereto, on December 1, 1936, the attorney in fact filed a petition placing M. L. U. in voluntary bankruptcy, which petition was dismissed by Judge Otis on December 30, 1936. See *In re Manufacturing Lumbermen's Underwriters* (18 F. Supp. 114). On January 16, 1937, the attorney in fact filed a mandamus proceeding in the Supreme Court to compel Judge Bird to act upon the application to disqualify himself. This court issued a stop order, which continued in force until February 19, 1937, preventing Judge Bird from mak-

ing any further orders. On February 27, 1937, and while the application to disqualify Judge Bird was still pending, an involuntary petition in bankruptcy was filed by a number of creditors of the Exchange. This proceeding was dismissed by Judge Reeves on July 7, 1937, and shortly thereafter an appeal was taken to the United States Circuit Court of Appeals. On March 2, O'Malley filed an amended petition setting forth the facts as disclosed by the examination of the insurance departments of the four states above mentioned. In order to eliminate the question of the qualification of Judge Bird, O'Malley, on March 3, filed an application for a change of venue, which Judge Bird granted, and the case was transferred to Judge Allen C. Southern. Thereafter, on April 1, 1937, the court entered a decree, as provided for in sections 6056 and 6058, permanently enjoining the defendants, dissolving the Exchange and vesting title to the property in the Superintendent of Insurance. On August 14, 1937, after the second bankruptcy petition was dismissed, O'Malley filed a petition in the court that he be directed to liquidate the Exchange. The court so decreed (Tr. 1343-1344). * * *

"* * * On December 12, 1936, under the foregoing circumstances and while the dispute was being litigated as to whether the federal court or the State Superintendent of Insurance should have charge of the property, both federal and state courts approved a stipulation entered into by the parties in litigation which had the effect of a court order and which read as follows: ' "Pursuant to stipulation of this date, and without prejudice as recited in said stipulation, R. E. O'Malley, Superintendent of Insurance of the State of Missouri, and Commerce Trust Company, Trustee, are authorized to pay to such clerical and actuarial employees and assistants and examiners as shall be designated by said R. E. O'Malley, Superintendent, such portions of compensation as said R. E. O'Malley or his duly authorized deputies or agents shall direct for such period up to, but not beyond, December 12, 1936, as

he or his said agent or deputy shall direct, it being understood that said R. E. O'Malley, Superintendent, may, at his own discretion, determine the employees and assistants to be paid and the amounts to be paid to them, and may discharge such of them as he deems unnecessary to employ. Provided, however, in no event shall said R. E. O'Malley, Superintendent, pay to any such employee or assistant or examiner compensation at a higher rate than such employee or assistant had been receiving up to the time said R. E. O'Malley, Superintendent, took charge, or as to examiners, higher than customary. Provided, further, that no compensation shall be paid to any director of Rankin-Benedict Underwriting Company.'"

"On December 23, 1936, the following order was made: '"Pursuant to a stipulation dated December 12, 1936, and a supplemental agreement and without prejudice as recited in said stipulation, R. E. O'Malley, Superintendent of the Insurance Department of the State of Missouri, and Commerce Trust Company, Trustee, are authorized to pay such ordinary expenses, including traveling expenses, postage, telegraph, telephone and usual operating expenses as shall be designated and determined by said R. E. O'Malley, Superintendent; and it is further ordered that the order of this Court of December 12, 1936, be modified so as to authorize payment of compensation to H. L. Fulton and Charles H. Isbell, even though they are directors of Rankin-Benedict Underwriting Company.'"

"On January 8, 1937, the following order was entered: '"It is Ordered that R. E. O'Malley, Superintendent of the Insurance Department of the State of Missouri, in charge of the affairs of defendant exchange, be and he is hereby authorized to pay such ordinary expenses, including traveling expenses, postage, telegraph, telephone, investigation, examination and usual operating expenses, as shall be designated and determined by said R. E. O'Malley, Superintendent"' (Tr. 1344-1345).

* * * * * * * *

"It will be noted from the foregoing that from November 16, 1936, until July, 1937, some action was pending, either in the federal court or in the state court, which prevented O'Malley from obtaining any definite order in the state court (Tr. 1345). * * * The courts, both federal and state, pursuant to stipulation, entered orders authorizing the superintendent to maintain the business of M. L. U. *in status quo* until the disputed questions as to jurisdiction could be settled. At least the orders may be so interpreted because they authorized O'Malley to pay the clerical force necessary to maintain the *status quo* (Tr. 1346).

* * * * * * * *

"* * * O'Malley, on December 12, was authorized to pay the employees engaged in taking care of the affairs of M. L. U. Had it not been for the application to disqualify the trial judge and for the bankruptcy proceeding O'Malley would have been in a position, on December 21, to have asked the court for a final decree, and also would have been free to have asked for rehabilitation and reinsurance orders. In the circumstances no definite order could be obtained. The superintendent therefore attempted to maintain the *status quo* while awaiting the determination of the questions of jurisdiction pending in the courts (Tr. 1348). * * *

* * * * * * * *

"The evidence disclosed that the superintendent did, through the employees under his charge, have examinations and reports made showing the exact status of the general business of M. L. U. for the purpose of reinsuring that phase of the business. He negotiated with the Pearl Insurance Company for that purpose and later with the Atlas Insurance Company. Evidence also disclosed that the employees compiled the necessary information and in a general way prepared to rehabilitate M. L. U. by ridding it of its termite condition, which was the general business, leaving to M. L. U. the reciprocal business. The

plan of reinsurance in the Pearl Insurance Company of the general business in all probability would have been consummated had it not been for the application to disqualify the trial court and for the bankruptcy proceedings which caused the cancellation of thousands of policies. Another unforeseen event which threw consternation into the plan was an unusual flood in the Ohio valley which resulted in losses in excess of $200,000, covered by policies of M. L. U. The Pearl Insurance Company then withdrew from further considering taking over the general business. Thereafter the second bankruptcy proceeding further aggravated the situation and by the time that question was settled M. L. U. was ready for liquidation (Tr. 1349).

* * * * * * * *

"Respondent's position is, that the superintendent cannot employ any help for such purpose without the approval of court and that the court must in the first instance fix the compensation of such employees. Section 6065 governs this question. Note its reading: 'He shall have power and authority, however, in such cases, and through the course of the whole case, to employ the necessary legal counsel and assistance, and clerical and actuarial force, subject to the approval of the court as to the amount of compensation to be paid them, * * *.'

"By an order the trial court in this case placed a limitation on the amount to be paid the employees in that they were not to be paid more than they had been paid by the attorney in fact for M. L. U. The pay roll was expressly approved and ordered paid by the court up to December 12, and note that O'Malley did not pay any help until ordered to do so by the court. The statute authorized the superintendent to employ the necessary help, and as to their compensation he must and in this case did have the court's approval (Tr. 1352). * * *

"Respondent argues that the superintendent had no power or authority to conduct the business of M. L. U. until after the court had directed rehabilitation, citing

section 6061. This case never reached that stage. O'Malley did not conduct the business of M. L. U. except in a very limited degree. No new business was taken on. All unwritten policies in the hands of the agents were ordered returned to the office. O'Malley did attempt to preserve the *status quo* of M. L. U. and have its affairs in such a condition that he could ask the court for an order to rehabilitate and reinsure as soon as a court vested with jurisdiction could make the necessary orders. That such a day was long delayed was no fault of the superintendent. When that day did arrive it was too late to do anything but ask for an order liquidating the concern. In the circumstances we are of the opinion that the superintendent did nothing more than the Insurance Code and the orders of the court authorized him to do. The holding and conclusions of the trial court that O'Malley expended money to conduct the business of M. L. U., to rehabilitate and reinsure without authority, is therefore erroneous (Tr. 1352-1353). * * * We rule therefore that the surcharge against O'Malley cannot be sustained on the theory that he acted without authority of law (Tr. 1354).

* * * * * * * *

"The entire surcharge in this case can have no basis except upon the theory that the Superintendent of Insurance had no authority under the law to rehabilitate M. L. U., maintain its *status quo* or reinsure the so-called general business without first going to the trial court and obtaining specific authority so to do. It is respondent's theory that no matter how honestly O'Malley may have acted in dealing with the affairs of M. L. U., he had no legal authority to act as he did and therefore he must be surcharged with the expenses thus incurred. This, as we see it, is an erroneous theory. As we pointed out the Superintendent of Insurance has certain powers and duties under the Insurance Code as a state officer and is not merely a receiver appointed by the circuit court. We say without hesitation that had it not been for the un-

wise attempt of certain parties to place M. L. U. in bankruptcy and otherwise hinder the actions of O'Malley by applying for a change of venue, rehabilitation of M. L. U. would have been an accomplished fact within a very short time after the superintendent took charge. That this was not accomplished was not O'Malley's fault and he and his surety should not be made the victim.

"The judgment is reversed (Tr. 1357-1358)."

It should also be stated that there never was any question of fraud or dishonesty on the part of the Superintendent of Insurance raised or even intimated in the case at bar. In fact, both counsel for petitioner and the trial judge commended the course of procedure that the Superintendent pursued and expressly stated that there was no question in the case about the expenditures that were made, except that the statute did not confer authority upon him to do so. At the hearing counsel for petitioner stated:

> "* * * I want to say this, that Mr. O'Malley's bank account checks perfectly with the disbursements that he reported; that the drafts which were listed in the settlement are perfectly in accord and reconcile with the bank balance and there is absolutely nothing wrong of that sort, and I don't want it understood that we are charging anything of that sort" (Tr. 171).

A representative of Superintendent O'Malley's successor stated:

> "There is no difference * * * on the question of money expended or properties of the company received and turned over and there will be no question made about expenditures except for the authority for them" (Tr. 866).

Counsel for petitioner further stated:

> "If they had succeeded in keeping it together, it would have been fine. I might say that the motive was wonderful, but I am afraid the judgment

was poor, because the statute, which is the guide under which the companies operate in these proceedings, in my opinion does not permit such conduct, although for the most praiseworthy motive, and I say nothing to impute anything to Mr. O'Malley or his staff in his attempt to save this company, except I don't believe that he had legal authority to do it" (Tr. 170).

The trial judge stated:

"I take it that * * * what Mr. O'Malley was trying to do * * * was * * * to get it into good hands and keep the business going. * * * That is what any body would do if they could" (Tr. 591).

Correction of Inaccuracies in Petitioner's Statement.

Some of the inaccuracies to be pointed out involve statements of law as well as of fact and therefore it becomes necessary to discuss some legal questions in connection with the questions of fact.

On page 2 of the petition there appears the statement that Manufacturing Lumbermen's Underwriters "was not a corporation or a mutual company but *simply* an association of individual subscribers to exchange indemnity on a reciprocal plan" (Emphasis ours). The word "simply" is a prediction of petitioner's basic theory and is used in an attempt to attach some significance to the fact that an insurance concern that is operated on a reciprocal plan is operated on a different plan than one operated as a stock corporation or a mutual company.

One of the principal assumptions on which petitioner predicates his entire argument concerning the due process and contract clauses of the Federal Constitution is contained in this statement on page 3 of his petition: "The rights of the subscribers in the reciprocal insurance association were governed by the written power of attorney executed by each reciprocal subscriber."

This assumption is entirely erroneous. It ignores the fact that the organization is operated and exists by virtue of a license issued by the State of Missouri. The rights

of subscribers to set up and operate such an organization is predicated upon obtaining that license which is granted in the exercise of the state's police power. All pertinent statutes of the state, therefore, become a part of every contract which the subscribers make, whether among themselves or between the entity which they set up and the subscribers individually, or otherwise. Therefore, the rights of the subscribers insofar as the state is concerned and the state's relation to this entity in handling its assets when they come under the control of the state agency—the Superintendent of Insurance—are governed by the applicable state statutes. The state's rights with respect thereto and particularly with respect to paying the expenses of the administration of the fund under the control of the state agency are not circumscribed by the contract between the subscriber and his attorney-in-fact. The state is not a party to that agreement and is not bound by such limitations, if any, as the subscribers may undertake to impose on their attorney-in-fact.

Moreover, petitioner gets no aid from that power of attorney because it contains no provision nor intimation that the expense of administering the fund by the Superintendent of Insurance may not be paid out of the fund itself.

In addition to the foregoing, the exceptions to the O'Malley report filed by petitioner's predecessor in office (not O'Malley) did not set up as a defense to the O'Malley account any provision of the power of attorney executed by the subscribers, nor did it intimate that payment of such expenses was in any way affected by that agreement. The issues in the case were made by O'Malley's report in detail of every item of receipts and disbursements during his entire administration and the exceptions thereto by his successor. Failing to assert in the exceptions that the expenses could not be paid out of the so-called 80%, much emphasized in petitioner's statement and brief, that matter was not in issue in the trial court and therefore was not in issue in the Supreme Court.

Even if the question had been appropriately raised by an exception to the report, then the question posed would have been one of construction of the written agreement between the subscribers and their attorney-in-fact. A misconstruction of that agreement by the supreme court of Missouri, if there had been such, which we deny, certainly would not have injected into the case any question of violation of either the due process or contract clauses of the Federal Constitution.

The second fundamental and erroneous assumption upon which petitioner's case here is bottomed is summarized in this statement on page 3 of his petition: "No application to the court was made for authority to expend the individual trust funds of the subscribers." From this premise, petitioner argues that moneys belonging to the subscribers were taken from them without due process and in violation of their contract rights.

The quoted statement is without support in the record insofar as it undertakes to predicate a fact and completely erroneous as to the legal conclusions which petitioner would draw therefrom.

There were no individual trust funds of the subscribers in the sense that any particular sum or item was segregated and belonged to the individual subscriber. The agreement between the subscriber and the attorney-in-fact required the keeping of records as to individual accounts for two reasons: First, if at the end of the year there was any saving in the premium which the subscriber had paid, that would be refunded to him; second, the subscriber's agreement with the attorney-in-fact provided that the subscriber might be assessed an additional sum equal to the amount which he had already paid as premium if that were necessary to meet the obligations of the exchange. The record, of course, was necessary for the purpose of determining the status of the account of the individual, either for the payment back to him of his part of the surplus or the making of an assessment if one were required. So far as the funds themselves

were concerned, they were never segregated or kept in individual accounts but, on the contrary, the subscribers' agreement provides they should be deposited in a trust company in the name of the attorney-in-fact, not in the name of the subscriber; so that the record concerning them was merely a bookkeeping entry made for the purposes above stated and not for the purpose of segregation and not for the purpose of creating them as individual trusts.

In addition to the fact that there were no individual trust funds of the subscribers, the last quoted statement is erroneous in asserting that no application to the court was made for authority to expend these funds. The opinion of the Supreme Court of Missouri hereinbefore quoted from contains this statement: "The courts, both federal and state, pursuant to stipulation, entered orders authorizing the Superintendent to maintain the business of M. L. U. *in status quo* until the disputed questions as to jurisdiction could be settled. At least, the orders may be so interpreted because they authorized O'Malley to pay the clerical force necessary to maintain the *status quo*" (Tr. 1463).

The court was referring to the orders of December 12 and December 23, 1936, and January 8, 1937, the first two of which authorized the payment of items within specified dates and the latter authorized payment of such items generally without limitation as to date. All of them were the very items and the type of items involved in this proceeding.

Petitioner also overlooks the fact that the very purpose of this entire proceeding and its only purpose was that the court pass upon the expenditure of the items in question. The previous orders generally authorized him to incur expenditures for maintaining the business in *status quo*, as the Supreme Court of Missouri construed them and stated in its opinion. His final report detailed the items dollar for dollar covering his entire administration, and asked the court to approve those expenditures. Peti-

tioner, representing all of the subscribers (which he admits in the first statement of his petition herein) was from the beginning a party to the proceeding as to the allowance of these items and objected to them and through him the subscribers made their objection and participated in the hearing. The petitioner himself, in a brief filed in the trial court, characterized this proceeding in this way: "Therefore, in examining this report for approval, the court must view the expenditures set out therein in exactly the same light as if the receiver was making application to incur these expenditures. Any expenditures found therein which appear to be unnecessary and which the evidence before the court discloses would not warrant court authorization if the expenditure had not already been made must now be disallowed by the court and the amount surcharged against the receiver, O'Malley."

It was a hearing in which petitioner's predecessor represented the subscribers and the purpose of it was to determine whether the expenditures made by O'Malley were proper. Therefore, when petitioner states, as he did in the above quotation, that no application to the court was made for authority to expend these funds, he forgets the three orders made by the court above mentioned and forgets that the whole purpose of this proceeding is to determine the propriety of those expenditures.

To assert that application must have been made before the expenditures were incurred would present a wholly impossible situation and one not contemplated by the statute and one which the Supreme Court of Missouri held not to be within the purport of the statute. There were many thousands of items involving expenditures of all types and there is no possible way that the number or amounts of those items could have been anticipated but the orders which the court made were broad enough to cover the expenditures by classes and types.

The Supreme Court of Missouri has held that the method pursued here was proper and the expenditures

were authorized. Section 6065, Revised Statutes of Missouri, 1939, being part of the Insurance Code, expressly provides that all necessary expenses in a proceeding of this sort "shall be taxed as costs and paid by the Superintendent out of the assets of such company." The funds which came into the custody and control of the Superintendent made up those assets. They included what petitioner in the above quotation has referred to incorrectly as individual trust funds of the subscribers. Except for the premiums paid by the subscribers, the exchange had no funds. Those premiums constituted its working capital and assets of whatever type. They were the assets out of which expenses of administering those assets necessarily and in accordance with the provision of the statute above quoted had to come. This proceeding was for the purpose of protecting the subscribers in their policies and to protect their creditors. There can be no sound reason why the assets being protected should not bear the expense of that protection.

The case of *Commonwealth* v. *Keystone Indemnity Co.*, 339 Pa. 405, 1 Atl. 2d 887, involved liquidation of a reciprocal insurance company in which the specific question was asked, "Does the subscriber's liability include * * * administration expenses, collection costs and other obligations incurred by the statutory liquidator?" The court held:

> "The expenses of liquidation must come out of the distributable assets * * *. Section 509 of the Insurance Department Act of 1921, P. L. 789, 40 P. S., Sec. 209, provides for the payment of expenses out of the funds or assets of such exchange. This insurance business could be conducted as required by legislation on the subject and not otherwise. If subscribers were not advised of this provision, their ignorance will not constitute a defense to the defendant for payment; they could only become parties to such reciprocal insurance on the terms allowed by the legislature. If their agreements included provisions pro-

hibited by or inconsistent with the statute, such provisions are nugatory."

The statement is made many times by petitioner, both in his petition and in his supporting brief, that the Supreme Court of Missouri had held that the Superintendent of Insurance had authority to expend funds of the subscribers without prior hearing or notice to those subscribers. We think the foregoing comments on this subject will correctly present the facts and conform to the record. It should be further noted, however, that the subscribers had prior notice and a hearing at every stage of the proceeding through their attorney-in-fact. The power of attorney set out as Appendix III, page 41, petitioner's brief, states:

> "2. Now, therefore, the undersigned as a subscriber of Manufacturing Lumbermen's Underwriters hereby appoint Rankin-Benedict Underwriting Company of Kansas City, Missouri, Attorney-in-fact for us and in our name, place and stead * * * to appear for us in any suit, action, or legal proceeding and to * * * defend * * * any suit, action or other legal proceeding * * *.
>
> "3. Said attorney is hereby specifically authorized for us and in our name to execute any and all documents and to do and perform all other acts * * * necessary * * * to effect compliance under the laws of any state * * * hereby confirming and adopting as binding upon us all appointments for service of process heretofore made."

This power-of-attorney is required to be filed with the Superintendent of Insurance of Missouri under Sec. 6080, R. S. Mo., 1929, of Article 11, dealing with reciprocals, and under Sec. 6081, R. S. Mo., 1939, the attorney-in-fact is required to "file with the Superintendent of Insurance an instrument in writing, executed by him for said subscribers, conditioned that, upon the issuance of the certificate of authority * * * service of process" is to be made through the Superintendent of Insurance on the at-

torney-in-fact "which shall be valid and binding upon all subscribers exchanging at any time reciprocal or inter-insurance contracts through such attorneys."

Petitioner's contention is that the funds out of which the expense items in question were paid were not really a part of the assets of the exchange and therefore not subject to the provisions of Sec. 6065, R. S. Mo., 1939, *supra*. That contention, however, can have no support in this record. Under agreement with the attorney-in-fact, it was entitled to 20% of the premiums in payment for management services and for defraying certain expenses. The remaining 80% constituted the only assets which the exchange had for paying claims and otherwise transacting its business. The record shows that the 20% to which the attorney-in-fact was entitled had already been paid to it and therefore no part of that sum came into the custody or control of the Superintendent. The 80% or whatever part of the 80% remained constituted the entire assets of which the Superintendent did have control. It was to protect that 80% that he, as the representative of the state, took charge and it was to protect the subscribers who had paid premiums and had policies that the proceeding was brought. Except for that asset there would have been nothing to conserve, no occasion for incurring or paying any expense and the question here involved would never have arisen.

Petitioner argues that the expense of this proceeding should have been paid by the attorney-in-fact out of the 20% which it received. The record shows that 20% had already been expended, that the attorney-in-fact had no funds, and that that 20% did not come into the custody or under the control of the Superintendent. It was therefore impossible that the administration expenses in this proceeding could have been paid in that way. It may be unfortunate that the subscribers selected an attorney-in-fact who could not or did not successfully operate the business and that by reason thereof it became necessary for the state, through the Superintendent of Insurance, to take charge. That circumstance, however, cannot relieve the assets of the concern from bearing the expense of administration made necessary by the failure of proper administration by the subscribers and their agent, the attorney-in-fact.

ARGUMENT.

Petitioner Attempts to Raise Questions Here Not Presented to the Supreme Court of Missouri.

Paragraph 2 of Rule 38 of this Court requires Petitioner to inform the court of "the questions presented." The petition and supporting brief are completely silent on this subject. It may or may not be an oversight. Compliance with that rule, in view of the state of this record, would be most difficult.

The exceptions of petitioner in the trial court did not present or intimate the questions presented here. Neither were they presented to the Supreme Court of Missouri. The first suggestion of these questions, if it could be designated as such, came in petitioner's motion for rehearing in the Supreme Court of Missouri, after that court had decided the case. It is significant to note, however, the language of petitioner in that motion. In Point I, he said, "that the *construction* given by the court to the powers of the Superintendent of the Insurance Department in expending funds of reciprocal insurance subscribers whose property is temporarily in the hands of the Superintendent deprives such subscribers (whom Respondent here represents) of their property without due process of law, in violation of Section 30, Article II, of the Constitution of Missouri, and in violation of the Fourteenth Amendment to the Constitution of the United States. * * *"

In his second point in the motion for rehearing, he said: "The *decision* of the court giving the Superintendent of Insurance authority to pay rent, salaries and the like from the individual funds of the subscribers * * * without prior notice, hearing or order of court violates Section 10, Article I, Clause 1, of the Constitution of the United States and Article I, Section 15, of the Constitution of Missouri, in this: Such construction of the laws

of Missouri amounts to the impairment of the obligation of the contract by the state. * * *" (Emphasis in each of the last two preceding paragraphs ours).

It will be noted and it is significant that petitioner did not claim in his Motion for Rehearing that the *Insurance Code violated the due process or contract clauses of the constitution,* but merely said that the *construction given them by the court and the decision of the court violated those provisions.*

Petitioner, in his two "Assignments of Error" in the petition (page 7 thereof) dresses these points up somewhat differently. They are not at all the points presented to the Supreme Court of Missouri, either in the petition for rehearing (Tr. 1360-1361 or in petitioner's motion to transfer (Tr. 1407-1409) filed in the Supreme Court of Missouri. In the latter court, his motion and all of the arguments which he presented were directed at the *construction* of the Missouri Insurance Code by the Missouri Supreme Court and not at the *validity* of it.

But, when Petitioner appears in this court, the language of his "Assignment of Errors" is changed and the attempt is made to challenge "the Missouri Insurance Code * * * as construed by the Supreme Court of Missouri." The attempt now is to condemn the statute rather than to have it construed as petitioner would like. This attempt appears on page 3 of the supporting brief in this language: "It should be made clear here that the petitioner is not attacking the correctness of the Missouri court's construction of the Missouri statutes. * * *" Notwithstanding that statement, the Petitioner presents to this court almost exactly the same language in support of his attack upon the Code as he presented to the Supreme Court of Missouri in order to obtain the construction of it which he desired.

Petitioner's effort, therefore, must fail both because he did not present to the Supreme Court of Missouri, either timely or otherwise, the constitutional objection

urged here, and because he is changing his position by asking this court to pass upon a question not presented to the Supreme Court of Missouri. The shifting of a few words in the presentation of the question here cannot accomplish the desired purpose. Petitioner did not say to the Supreme Court of Missouri, "The statutes are unconstitutional." Failing in that, he is not in a position to say that for the first time to this court.

This expression from *Goldrick* v. *Compagnie Generale Transatlantique*, 309 U. S. 430, 434, fits this situation precisely:

> "* * * it is * * * the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the Federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below (Citing cases). * * * In cases coming here from state courts in which a state statute is assailed as unconstitutional, there are reasons of peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review. Apart from the reluctance with which every court should proceed to set aside legislation as unconstitutional on grounds not properly presented, due regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there. It is for these reasons that this Court, where the constitutionality of a statute has been upheld in the state court, consistently refuses to consider any grounds of attack not raised or decided in that court (Citing cases, parentheses ours)."

Therefore, independently of the fact that the questions petitioner attempts to raise were not raised timely as heretofore discussed, and in fact raised at all, the writ should be denied for the further reason that petitioner

does not present any question to this court that was presented to the Supreme Court of Missouri.

Supreme Court of Missouri Merely Passed upon the Construction of a State Statute and Not upon Any Federal Question.

As above demonstrated, the actual question that petitioner presented to the Supreme Court of Missouri and the only question that could be for decision in this Court was not a federal question but merely a question concerning the *construction* of a state statute. Under these circumstances, this Court will deny the petition for writ of certiorari.

Central Land Company v. *Laidley,* 159 U. S. 103, 109-110, held:

> "The appellate jurisdiction of this court * * * to a state court, on the ground that the obligation of a contract has been impaired, can by invoked only when an act of the legislature alleged to be repugnant to the Constitution of the United States has been decided by the state court to be valid, and not when an act admitted to be valid has been misconstrued by the court. The statute of West Virginia is admitted to have been valid, * * * and it necessarily follows that the question submitted to and decided by the state court was one of construction only, and not of validity. If this court were to assume jurisdiction of this case, the question submitted for its decision would be not whether the statute was repugnant to the Constitution of the United States, but whether the highest court of the state has erred in its construction of the statute. * * *"

Neblett v. *Carpenter,* 305 U. S. 297, 302, held:

> "It is said that the Code does not authorize the Commissioner to delegate to a corporation organized by him powers and duties in aid of his administration of the assets of an insolvent insurance company. The state court has held such procedure is in accordance with the Code provisions.

"It is argued that the authority which the Code confers on the Commissioner to enter into rehabilitation or reinsurance agreements does not embrace a contract for assumption of the insolvent company's policies by a new company organized by the Commissioner. The court below held the provisions of the statute contemplated such action.

"It is claimed that the Commissioner's action violated certain state statutes concerning fraudulent conveyances. The state court held the contrary.

"All of these holdings concern matters of state law and amount at most to alleged erroneous constructions of the State's statutes by its own court of last resort. Such decisions would not be a denial of the due process guaranteed by the Fourteenth Amendment. We, are, therefore, without jurisdiction to review the state court's decision of any of those questions."

The petition should be denied for still another reason. There is no impairment of the contract clause of the Federal Constitution because, as heretofore noted, no contract right is impaired. The contract between the subscribers and their attorney-in-fact contains no prohibition against the use of any of the funds of the subscriber for the payment of the expenses in question. To read into the contract any such prohibition would do violence to its terms and would be directly contrary to Section 6065, Revised Statutes of Missouri, 1939, which expressly provides, as heretofore noted, that the expenses of this sort of proceeding must be paid out of the assets of the exchange, which assets necessarily include, as the Supreme Court of Missouri held, the premiums paid in by subscribers. The subscribers did not, by their contract, undertake to prevent the state, through its Superintendent of Insurance, from paying those expenses and, if it had, it would be contrary to the provisions of that statute.

The contention that the subscribers were deprived of their property without due process of law in violation of the Federal Constitution must also fail because the

record demonstrates that the subscribers stipulated as to the payment of these items in the two orders and had notice of a third order through their attorney-in-fact and had a hearing before the order was made. The Supreme Court of Missouri so held. In addition to the foregoing, the fact that this proceeding itself is one in which the subscribers are themselves participating, to determine whether these items should be paid, conclusively eliminates any possibility of claiming as a fact that any funds are being expended without notice to the subscribers and a hearing thereon.

Conclusion.

The failure of petitioner to comply with the rules of this Court, his failure to present here any federal question which was raised in the Supreme Court of Missouri, his failure to present here any federal question at all, and the fact that the record completely disproves the underlying facts which he must establish, regardless of all other considerations, in order to bring before this Court a federal question, demonstrate that he has failed to sustain the burden imposed upon him by the rules and decisions of this Court to show grounds for granting the petition for writ of certiorari. We earnestly urge that the petition should be denied.

Respectfully submitted,

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